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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-945

C. W. JONES, and C. W. JONES and JONES INVESTMENT COMPANY, d/b/a SUMMIT HOMES, and JOMACO, INC.,
Petitioners,

vs.

C. ED GAINES,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINIONS BELOW

Respondent concurs in petitioners' statement of opinions below, but calls to the Court's attention that, subsequent to the filing of the petition for a writ of certiorari, the opinion of the Court of Appeals was reported at 486 F.2d 39.

STATEMENT OF THE CASE

Respondent takes issue with petitioners' Statement of The Case and deems it necessary to correct certain inaccuracies and omissions contained therein. Respondent takes issue in particular with the following argument and conclusions found at page 7 of petitioners' Statement of The Case:

> "The Eighth Circuit Court of Appeals filed its Opinion on October 18, 1973, reversing the District Court and holding the petitioner liable for the Seventy-five Thousand Dollars ($75,000) and interest, *and in so doing recognized that it did not follow the applicable law of Missouri* when it stated that the Court 'is applying the test which it believes should be the controlling principle'." (Emphasis Supplied)

To avoid any duplication, Respondent respectfully calls to the attention of this Court the statement of facts contained in the opinion of the Eighth Circuit Court of Appeals, 486 F.2d 39, at page 40.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

1. Petitioners Have Not Been Deprived of Their Day in Court.

Petitioners contend that the Eighth Circuit Court of Appeals, in contravention of the rule set forth in *Saunders* v. *Shaw*, 244 U.S. 317, 37 S.Ct. 638 (1917), deprived them of their day in court, thereby depriving them of due process of law in violation of the Fifth and Fourteenth Amend-

ments to the Constitution of the United States, by refusing to order a new trial. Since this case originated in the Federal Courts and is not concerned with state action in any form, it is difficult to imagine how it could present any issues under the due process clause of the Fourteenth Amendment since that amendment, by its terms, applies only to the states.

In support of their position that they have been deprived of their day in court, petitioners cite *Saunders* v. *Shaw,* 244 U.S. 317, 37 S.Ct. 638 (1917) and *Helis* v. *Ward,* 308 U.S. 365, 60 S.Ct. 283 (1939). In *Saunders* v. *Shaw,* supra, the defendant at the trial court level objected to the introduction of evidence by the plaintiff to show that his (plaintiff's) land would not be benefited by a certain levee system. The trial court excluded the evidence as inadmissible under the pleadings and the defendant did not offer any evidence regarding the physical condition of the land since it was defendant's contention, and the trial court's ruling, that such evidence would be inadmissible. The trial court found in favor of defendant. On appeal the Supreme Court of Louisiana affirmed and then upon rehearing, reversed the judgment, with such reversal based upon the evidence excluded by the trial court and upon a decision of this court rendered subsequent to the first decision in *Saunders.* This court held that under such circumstances, the defendant had not had the proper opportunity to present his evidence to rebut that of the plaintiff which had previously been ruled to be inadmissible.

Petitioners cite the case of *Helis* v. *Ward,* supra, as being "quite similar" to the present case and further state that this court declined to order a new trial in that case "only because there the petitioner failed to seek a new trial in his motion for rehearing and in his Petition for

Certiorari to the Supreme Court". It is submitted that a careful reading of *Helis* v. *Ward,* supra, reveals that the case was not similar to the present case. Further, it is not "clearly indicated" that a new trial would have been granted had petitioner only requested one. Again, a careful reading of *Helis* v. *Ward,* supra, indicates that petitioner in that case apparently did seek a new trial in his petition for rehearing and his petition for a writ of certiorari was granted, limited to that precise question. *Helis* v. *Ward,* supra, 308 U.S. at 369. However, as appears later in the opinion, petitioner advanced grounds for a new trial not contained in either his petition for rehearing or petition for writ of certiorari.

The rule of *Saunders* v. *Shaw,* supra, is clearly not applicable to the present case. In *Saunders,* evidence was not offered because it was defendant's contention, and the trial court's ruling, that such evidence would be inadmissible. In the present case the transcript in the trial court reflects that petitioners were given every opportunity to and did offer evidence. They were not at any time foreclosed by the trial court from offering evidence and on appeal, there was no such "dramatic change of the law by the Eighth Circuit" as contended by petitioners. Petitioners were apparently content with the quantum of evidence which they adduced at the trial. However, now that the Eighth Circuit has reversed the judgment of the trial court and directed the entry of judgment in favor of respondent, the petitioners would apparently like a second chance to attempt some different trial approach. The amount of evidence which petitioners adduced at trial was strictly a matter of trial tactics and does not bring the present case within the rule of *Saunders* v. *Shaw.*

2. The Decision of the Eighth Circuit Court of Appeals Is Not in Contravention of the Holding in Priebe & Sons, Inc. v. United States, 332 U.S. 407, 68 S.Ct. 123 (1947).

Contrary to petitioners' contentions, the decision of the Eighth Circuit follows the decision of this court in *Priebe & Sons, Inc.* v. *United States*, 332 U.S. 407, 68 S.Ct. 123 (1947). This court stated: "And the fact that the damages suffered are shown to be less than the damages contracted for is not fatal. These provisions [liquidated damages] are to be judged as of the time of making the contract." *Priebe & Sons*, supra, 332 U.S. at 412. Thus, this court adopted the "foresight test" of whether a liquidated damage clause is or is not a penalty, the test so vigorously opposed by petitioners. This court held that the liquidated damage clause in *Priebe & Sons*, could not be sustained because of the fact that *at the time the contract was made* it was certain that no damage would be occasioned by the only situation to which the liquidated damages provision could ever apply. This court held that under such circumstances, the provision could not be a reasonable forecast of just compensation for the damage caused by a breach of contract. The Eighth Circuit Court of Appeals applied the same foresight test to the liquidated damage provision in the present case and found it to be "a reasonable forecast of the harm plaintiff [respondent] could expect if he was discharged prior to sharing in the profits." 486 F.2d at 44. Further, in the case of *Rex Trailer Company, Inc.* v. *United States*, 350 U.S. 148, 76 S.Ct. 219 (1956), this court compared the Government's recovery to liquidated damage provisions which fix compensation for anticipated loss and stated: "As this Court recognized in Priebe & Sons v. United States, 332 U.S. 407, 411-412, 68 S.Ct. 123, 126, 92 L. Ed. 32, liquidated damages 'serve a

particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts. * * *' And the fact that no damages are shown is not fatal." 350 U.S. at 222. Therefore, it is submitted that the decision of this court in *Priebe & Sons,* supra, is not contravened but rather followed by the decision of the Eighth Circuit Court of Appeals in the present case.

3. The Decision of the Eighth Circuit Court of Appeals Does Not Contravene Erie Railroad v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938).

In item Nos. 3 and 4 of their Reasons Relied On for the Allowance of the Writ, petitioners contend that the Court of Appeals failed to follow the applicable law of Missouri regarding liquidated damage clauses. An examination of the Missouri Supreme Court Cases, *Wilt* v. *Waterfield,* 273 S.W.2d 290 (Mo., 1954), *Yerxa, Andrews & Thurston, Inc.* v. *Randazzo Macaroni Mfg. Co.,* 315 Mo. 927, 288 S.W. 20 (1926) and the federal cases arising in Missouri, *Southwest Engineering Co.* v. *United States,* 341 F.2d 998 (8th Cir., 1965), cert. denied, 382 U.S. 819, 86 S.Ct. 45, *Manufacturers Casualty Ins. Co.* v. *Sho-Me Power Corp.,* 157 F.Supp. 681 (W.D. Mo., 1957), *J. D. Streett & Co.* v. *United States,* 256 F.2d 557 (8th Cir., 1958), cited by the Eighth Circuit Court of Appeals, reveals that its decision does not conflict with the law of Missouri as suggested by petitioners. On the other hand, it is submitted that the Missouri lower appellate court cases cited by petitioners, one of which (*Stein* v. *Bruce,* 366 S.W.2d 732 (Mo.App., 1963)) applies the law of the state of Pennsylvania, are not controlling here.

It is further noted that this court has held that it will ordinarily accept the determination of local law by the

Court of Appeals. *C.I.R.* v. *Estate of Bosch,* 387 U.S. 456, 87 S.Ct. 1776 (1967), *Pierson* v. *Ray,* 386 U.S. 547, 87 S.Ct. 1213 (1967).

CONCLUSION

This court, in Rule 19, has indicated the types of cases which ordinarily will, in its discretion, call for the issuance of a writ of certiorari. Based on the foregoing, it is respectfully submitted that petitioners have failed to establish that the decision of the Eighth Circuit Court of Appeals in this case presents questions which should be settled by the United States Supreme Court.

Respectfully submitted,

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